BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the Court of Appeals appears at pages 198, 199, 200 and 201 of the original record. The order reversing the judgment of the District Court is at page 202, the order denying the motion for rehearing is at page 209, and the Certificate of the Clerk of the Circuit Court of Appeals is at page 213. The opinion also appears in the advance sheet of Federal Reporter (2d Series) of December 22, 1941, the same being 123 Fed. (2d) 280. However, this advance sheet does not show that any rehearing was applied for and the same denied.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, the same being 28 U. S. C. A. 347 (a).

2. The date of the judgment of the trial court was May 2, 1941, and the same is found at pages 179, 180 and 181, the original record.

An appeal was perfected by the present respondent, J. P. Dyar, to the Circuit Court of Appeals for the Fifth Circuit and the judgment of the District Court was there reversed and the cause remanded on November 12, 1941. Motion for rehearing was duly made and overruled on December 16, 1941, and on December 24, 1941, an order was made staying the issuance of the mandate of the Circuit Court of Appeals for thirty days pending the filing of the petition for certiorari in this Court.

III.

STATEMENT OF THE CASE.

In the petition at pages 1 to 16, inclusive, is a full statement of the case, and we will not burden the record here with a restatement of this cause.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Fifth Circuit erred in the following particulars, separately and severally:

1. (a) In holding that the testimony of the witness, J. Marvin Kelley, with reference to the notice of the sale of the suit property was to be believed and accepted, and that of J. F. Stewart was to be disbelieved and rejected in contravention to the findings of the facts of the trial court to the direct contrary.

1. (b) In holding that the amount paid by Dyar for the suit property in 1932 was not grossly inadequate in contradiction to the findings of the trial court before whom the witnesses, as to value, appeared and testified and in its decision looking to prices generally in 1932 as a determinative.

2. In holding that Stewart's petition could not be maintained where he had waited eight years from date of the sale in question before filing it, though the comparable period of limitations in Alabama is ten years and the parties involved could be restored to their original positions and offer to do so was made.

V.

SUMMARY OF ARGUMENT.

Specification of Error One (A).

The questions involved on this appeal are mixed questions of law and fact, that is, the true state of facts as represented by conflicting testimony of witnesses seen and heard by the trial court and the propriety, in so far as the principles of law are concerned, of a reviewing court setting aside the findings of fact of the trial court under the circumstances herein set out.

The first specification of error involves almost identical points, and for this reason we have coupled them together as One (a) One (b), though these are specified as several errors and are so argued.

Specification of error One (a) involves the question of the reversal of the findings of fact of the District Court numbered Two and Three (Record 180) and Specification One (b) involves the reversal of the findings of fact numbered One (Record 180).

The first question as to whether or not J. F. Stewart had notice of the proposed bankruptcy sale to Dyar previous to the time it was made and until September or October of 1940 is the vital question involved in the consideration of this case. No question of knowledge or facts subsequent to 1932 and sufficient to charge Stewart with notice of the sale of 1932 is involved.

The question concerns itself with whether or not Stewart did or did not sign a waiver of notice of a proposed private sale of the property and whether or not the trustee ever discussed this proposed sale with Stewart before or after it was made. There were only two witnesses on the entire subject, Stewart, and the former Trustee, Kelley,

and like all of the other testimony in this case, the same was heard orally before the Court on March 29, 1941, and the case taken under advisement. Their testimony was in direct conflict and the District Court resolved the question in favor of Stewart. This finding of fact the Court of Appeals reversed, but without any apparent consideration of the original waiver bearing the alleged signature of Stewart and certain admittedly genuine signatures of Stewart which were before that Court.

The holding of the Court of Appeals is based, according to the opinion, on the fact that Kelley, the former trustee, is a disinterested witness, and no reason is shown for disbelieving his testimony. This reversal is attacked on several grounds, namely: (1) that the Court of Appeals failed to consider Rule 52 (a) of Civil Procedure requiring the finding of fact of the District Court to be accepted unless clearly erroneous, and also requiring that due regard be given to the trial court's opportunity of seeing and hearing the witnesses testify; (2) that the Court of Appeals has sought to determine and decide the credibility of the witnesses it has never seen or heard testify; (3) that the logical course of the testimony of the two witnesses favors Stewart and not Kelley, as the District Court found, and particularly so when the original written instruments introduced in evidence as to signatures is considered, and (4) that no reason need be shown why Kelley's testimony is to be rejected, as the Court of Appeals supposed in its opinion, since the presumption is in favor of the findings of the District Court. In addition, the proposition that Kelley was a disinterested witness is also attacked.

Specification of error One (b) relates to the holding of the Court of Appeals, in contradiction to the findings of fact of the District Court, that the price paid by Pyar in 1932 for the suit property was not grossly inadequate.

This price for the 438 acres involved was approximately $1,250.00, and the testimony of petitioner's witnesses, obviously adopted by the District Court out of a conflict of testimony, averaged about $8,500.00 as the cash market value of the suit property in 1932.

Almost the same errors in this holding of the Court of Appeals are assigned as were in Specification of Error One (a), that is, the consideration of Rule 52 (a), the decision as to the credibility of the witnesses on a sharp conflict of testimony, and that the testimony of the witnesses on value when reconsidered should be resolved, even aside from other consideration, in favor of petitioners, as the District Court found. In action it appears that the Court of Appeals based its holding on the extrinsic fact that in deciding values of property in 1932 we must live again those days of the depression, apparent positive testimony of witnesses to the contrary notwithstanding.

The Court of Appeals concedes that there was "mere" inadequacy, but not "gross" inadequacy, in the sale price, and, of course, this is one reason for saying that specification of error One (a) is of importance, for even were petitioners wrong as to there being gross inadequacy of price, still, such fraud as Stewart testified to and as is set out in Specification of error One (a) when considered with even mere inadequacy of price, would require the sale to be set aside.

Specification of error Two takes up the proposition of laches, and this again is based upon assumption of fact that the rights of the parties over a period of time less than the comparable Alabama Statute of Limitations of ten years have become fixed, but this without any showing of wherein such rights have so become fixed other than that some terracing and clearing of the land, paid by governmental subsidies, and the building of a road, by

Lawrence County, Alabama, have been accomplished in the eight-year period. A consideration of the testimony and of the trial court's opinion shows that no rights had become fixed, and that the original position of all parties can be and were offered to be restored to their original. The findings of fact of the trial court numbered Four shows that certain equities have arisen over the period of the eight years, that is, being the fact that during that period of time certain of the original 557 acres purchased by Dyar from Kelley have been sold to third parties, but that no other or different equities, rights, privileges, or dues have accrued in favor of Dyar over this period of time, and that the parties can be restored to their original position as of 1932 by a mathematical calculation referred to the Referee in Bankruptcy.

This holding on this particular point of the Court of Appeals, even conceding their decision of fact, is in direct contravention to the doctrine of this State on the subject as illustrated by the case of Hausser v. Foley & Company, 190 Ala. 437, 67 So. 252, 253, all of which is set out in detail in the argument.

But once again we must revert to our original proposition of whether Stewart had notice of the sale to Dyar, or of any proposed sale, and whether or not the name of Stewart appearing on the alleged waiver of notice was genuine or a forgery. If it was a forgery and if Stewart had no notice, in spite of Dyar's position of the suit property, obviously no laches could attach, for, confessedly, the fraud on Stewart would preclude the operation of any principle of law barring actions by Stewart over a period of only eight years. So then we will admit once more to the original proposition of the controlling question as to the propriety of the Circuit Court of Appeals in reversing the finding of fact of the trial court as to the notice of Steward.

BRIEF.

SPECIFICATION OF ERROR ONE.

We do not contend that the Circuit Court of Appeals does not have the right and power in proper cases to overturn and upset the findings of fact of a trial court even where the trial court sees and hears the witnesses and makes the findings of fact, as was done in this case.

The duty of the Circuit Court of Appeals in considering questions of fact ascertained by the trial court is set out in Rule 52 (a) of Civil Rules of Procedure, formerly Equity Rule 70½, the same being as follows:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in the granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. **Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.** The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

The emphasis of the quoted excerpt is ours and shows the portion of the Rule which is applicable in this discussion.

In approaching this subject as relating to the case at hand, we feel it should be treated in two different aspects, namely: (1) that it is not shown that the findings of fact of the trial court (Record 179, 180, 181) were clearly erroneous and that no due regard was given in the decision to the opportunity of the trial judge to see and

hear the witnesses testifying. (2) The Circuit Court of Appeals has taken upon itself to decide and pass upon the credibility of the witnesses Stewart and Kelley.

We would first discuss subdivision 1 of the paragraph next hereinabove as there indicated. At the outset, we would set out the first portion of the decision and the opinion of the Court which falls under this classification of our argument. It is as follows from Record page 200 and also from 123 Fed. (2d) 278, 279, 280:

"J. F. Stewart, the appellee, contended in the court below, and contends here, that the sale to Dyar should be set aside; that he had no notice of the sale of the property; that while his name appeared on the consent filed by the creditors, he did not sign the paper or authorize anyone to sign for him; and that the sale price of $1,500.00 was so grossly inadequate as to amount to legal fraud and call for a cancellation of the deed. (fol. 200) Stewart testified positively that he never had notice that the sale was to be made; that he did not sign the creditor's consent; and that his name on this paper was a forgery. The trustee, J. Marvin Kelley, who had received his discharge at the time of the hearing of Stewart's petition, testified that Stewart did sign the paper in his presence; that he and Stewart discussed the selling of the farm; and that he 'asked him if he could buy it, but he wasn't interested in buying it.' He further testified that he discussed the sale of the farm lands with Stewart 'before the sale and after the sale'; that Stewart knew he had sold the farm to Dyar; and that after the sale of the farm to Dyar he deposited the money in a bank that failed and Stewart 'asked me what we were going to do since the bank failed.' Kelley was a disinterested witness and we see no reason for rejecting his testimony in this matter." **Fol. pages 199, 200. R. P. pages 198 and 199.**

As shown by the quoted excerpt and by the testimony of the only two witnesses on the subject (Stewart, Record 73, 87; Kelley, 107, 120) the testimony on the question as to whether or not Stewart had notice of the proposed sale to Dyar and as to whether or not Stewart signed the written waiver or that his name thereon was a forgery, was in

hopeless conflict. No mention is made in the opinion of the Circuit Court of Appeals of the alleged signature of Stewart on the alleged waiver and the admittedly genuine signatures of Stewart on certain other instruments, and all of which were in the original before that Court (Record 190, 191, 192 and 193).

The trial court found the issues in favor of Stewart by its findings of fact two and three (Record 180), and this the Circuit Court of Appeals has reversed and found the opposite. In short, this is the question here, the propriety of the Appellate Court's action in reversing the findings of fact.

Now, reverting to Rule 52 (a) of Civil Procedure, hereinbefore set out, we assert that it must have a definite field of operation. Here the Court of Appeals has rejected the findings of the trial judge, reversed his decision of fact completely and disposed of it entirely with one sentence (Record 200; 123 Fed [2nd] 278, 280:

"Kelley was a disinterested witness and we see no reason for rejecting his testimony in this matter."

This is the sentence used by the Court, and the only one used immediately following the statement of the Court as to the conflict in evidence. Does this show the due regard given to the findings of the trial judge contemplated by Rule 52 (a)? Does it show that in the opinion of the Circuit Court of Appeals the findings of the trial Court were clearly erroneous, or even does it show that the findings were clearly erroneous?

We insist that the statement of the Court deciding this point of the case shows in and of itself that these two questions must be answered in the negative, for the decision shows a balancing of the testimony of the two witnesses and then a statement that the witness, Kelley, the former Trustee of the Livingston estate, is disinterested, his testi-

mony is true and that of Stewart's is not. Incidentally, Kelley is hardly disinterested where the sale attacked is one that he made and in confirmation of his acts would like to see it being upheld.

In this the Court was in error, and in rendering its decision has made a conflict not only with decisions of this Court, but also of its own and of other sales.

We would first call this Court's attention to the notes of the Advisory Committee on Rules in connection with Rule 52 (a). As taken from 8 Federal Code Annotated, 733, it is as follows:

> "Under this mandate there are two categories of issues of fact in civil actions:
>
> "(b) Those issues of fact as to which no right to jury trial exists or as to which such right to jury trial has been waived. The first class of issues is tried by a jury; the second class is tried by the court, subject to the court's discretionary power to order such issues tried by a jury or referred. The verdict of the jury upon the issues of fact in the first class is binding on the reviewing court if there is any evidence at all to support it. But a problem arises in connection with the second class of issues, as to the effect of findings of fact by the court. There are at least three solutions. The first is to retain the present system of review, viz., that in jury-waived cases, the findings of fact shall have the same effect as the verdict of a jury in an action at law; which in equity cases, the findings of fact are reviewable as to the weight of the supporting evidence as well as the sufficiency. The objection to this is that it perpetuates the very procedural distinctions we are attempting to abolish. The second solution is to provide that the findings of fact in all cases should be reviewed in the same way, and that they should have the same effect as the verdict of a jury. Such treatment, though providing for a uniform and simple method of review and fulfilling

the mandate of our enabling statute, has not met with approval by a majority of the Committee. The third is the system here proposed. This fulfills the mandate of the statute, while also abolishing the ancient procedural distinctions on review for a natural division which preserves the jury trial intact, but leaves all other trials subject to review. The rule stated in the third sentence of subdivision (a) accords with the decisions of the scope of the review in modern equity practice. See Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (C. C. A. 8), 204 Fed. 166, Ann. Cas. 1918 B 571, Cert. den. 229 U. S. 624, 57 L. Ed. 1356, 33 S. C. R. 1051; Warren v. Keep, 155 U. S. 265, 39 L. Ed. 144, 15 S. C. R. 83; Furrer v. Ferris, 145 U. S. 132, 36 L. Ed. 649, 12 S. C. R. 821; Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664, 8 S. C. R. 894; Kimberly v. Arms, 129 U. S. 512, 32 L. Ed. 764, 9 S. C. R. 355."

From several of the cases cited in the above Note of the Advisory Committee, we would quote from several. From Silver King Coalition Mines Co. v. Silver King Consolidated Mining Co., 204 Fed. 166, 177, Cert. den. 33 Supreme Court 1051:

"Each of the findings of fact from which the Court deduced this conclusion is vigorously assailed by each of the parties to this suit in oral argument and in briefs which contain many hundreds of printed pages. Each of them has been carefully examined, with the aid of these arguments and briefs, and in the light of the evidence to which they refer, and has been found to have been deduced from conflicting testimony, and many of them from evidence very evenly balanced. These findings, therefore, fall far within the familiar rule that, where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand."

From Tilghman v. Proctor, 125 U. S. 136, 149, 150, we have the following:

> "We are then brought to a consideration of the exceptions taken to the master's report in matters of fact, affecting the accuracy of his conclusions in respect to the amount of those profits, gains and savings. In dealing with these exceptions, the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. Medsker v. Bonebrake, 108 U. S. 66; Donnell v. Columbian Ins. Co., 2 Sumner 366, 371; Mason v. Crosby, 3 Woodb. & Min. 258, 269; Paddock v. Commercial Ins. Co., 104 Mass. 521, 531; Richards v. Todd, 127 Mass. 167, 172."

From Furrer v. Ferris, 145 U. S. 132, 134:

> "* * * This presented mainly a question of fact. Upon the testimony, both the master and the Circuit Court found that there was no negligence, and, while such determination is not conclusive, it is very persuasive in this Court. In Crawford v. Neal, 144 U. S. 585, 596, it was said:
>
> " 'The cause was referred to a master to take testimony therein, "and to report to this court his findings of fact and his conclusions of law thereon." This he did, and the court, after a review of the evidence, concurred in his finding and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. Tilghman v. Proctor, 125 U. S. 136; Kimberly v. Arms, 129 U. S. 512; Evans v. State Bank, 141 U. S. 107.' "

From Warren v. Keep, 155 U. S. 265, 267:

> "* * * There was a considerable amount of this evidence, and it was, to some extent, conflicting. The

master acted in view of this evidence, and the court below concurred in his finding, except in some unimportant particulars. As no obvious error or mistake has been pointed out to us, their conclusions must be permitted to stand. Tilghman v. Proctor, 125 U. S. 136; Crawford v. Neal, 144 U. S. 585; Furrer v. Ferris, 145 U. S. 132."

The cases seem to establish a definite rule as to the weight to be given the findings of the trial Judge which is now codified in Rule 52 (a) of Civil Procedure. In each of the cases above noted, save one, the findings of the trial court were accepted, and in that one case this Court went into great detail to show why such conclusion was unreasonable and unsound.

We do not mean to contend that the Circuit Court of Appeals should or must show wherein and why the findings of the trier of facts are erroneous, for no doubt it could reverse because of such without any comment whatsoever, but where, as here, the reason for the reversal is set out in the opinion, we can look to the cause of the reversal and ascertain definitely what it is that shows in the opinion of the Circuit Court of Appeals that the finding of the trial Court was clearly erroneous, or that the Circuit Court of Appeals, in rendering its decision, did or did not give due weight to the opportunity of the trial judge to see and listen to the witnesses.

The cause for reversal, as set out in the opinion, is that Kelley is a disinterested witness, and no reason is shown for rejecting his testimony.

But no reason need be shown by us why his testimony should be rejected, for there is a presumption in favor of the findings of the trial Court, in favor of its findings that Stewart's testimony is to be accepted and Kelley's rejected. This is the holding there of the cases which

are above quoted from, and there is no reason enough why Kelley's testimony should not be rejected, for it was a trial judge and not the Circuit Court of Appeals who saw and heard Kelley testify and who likewise saw and heard Stewart testify.

How can it be said that this statement of the Court, that is, Kelley is a disinterested witness and no reason is seen for rejecting his testimony, fulfills the requirements of Rule 52 (a) only if the findings of fact is clearly erroneous and due regard is given to the presence of the trial judge at the taking of the testimony, either or both?

No more classic a statement concerning a presumption due the findings of a trial judge can be found than contained in Utterman v. Sternberg, 86 Fed. (2) 321. This matchless expression is so apt here, where the oral evidence is in conflict and the witnesses are arrayed, one against one. From the above-cited case we quote from page 324 of 86 Fed. (2nd) as follows:

> "The late Judge Lamm has given us in graphic language embodying both good law and good literature, in the case of Creamer v. Bivert, 214 Mo. 473, loc. cit. 479, 113 S. W. 1118, 1120, the reasons back of the rule, thus: 'The bulk of the testimony was oral. In such condition of things, while this court has said over and over again that the whole record must come here in equity cases, so that (sitting as the final arbiter in chancery) we may weigh and decide de novo and thus do equity, yet the court is also fond of saying that deference should be given to the trial chancellor. He sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in

nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify. Therefore, where an issue in equity rests alone on the credibility of witnesses, the upper court may with entire propriety rest somewhat on the superior advantage of the lower court in determining a fact."

To show the confusion into which the Circuit Court of Appeals has led by its holdings with reference to the accepting of the testimony of Kelley in spite of the trial Court's findings to the contrary, it is interesting to note how the West Publishing Company has written the first headnote for this case as the same appears in 123 Fed. (2nd) 278, interpreting that portion of the opinion herein discussed. It is an absurdity and nonsensical, yet under the circumstances little else could be done or written as a syllabus. It is written as follows:

"Where former bankruptcy trustee who was a disinterested witness testified that a creditor signed a paper consenting to sale of bankrupt's estate at private sale and that trustee discussed the sale with the creditor before and after the sale and eight years passed since confirmation of sale, creditor could not

complain that he had no notice of the sale so as to authorize vacating of the sale by former bankruptcy trustee."

The holding of the Court does just one thing in its tantamount to place a premium on the testimony of the former bankruptcy trustee, and in matters of the character here it makes the same priceless, regardless of other circumstances.

While the Circuit Court of Appeals, in its opinion here, went into no detailed discussion of the testimony and evidence, we would invite this Court's attention to an inspection of the testimony of Stewart (Record 73, 87), Kelley (Record 107, 120).

As indicated previously, not only is the decision of other Circuits against this holding of the Circuit Court of Appeals, but its own decision as well are to the contrary. From Stevens v. Edwards, 112 Fed. (2nd) 534, 536, we quote:

"The evidence in the record is in sharp dispute in many particulars. The court was confronted with the witnesses and had opportunity to judge of their credibility. It is the rule of federal courts and in the courts of Florida that the findings of the court upon the evidence will not be disturbed on appeal unless such findings are shown to be clearly erroneous. After a full hearing the court below determined the issues of fact adverse to the contentions of the appellant, and we are of opinion and so hold that the evidence fully supports his findings. Rules of Civil Procedure for District Courts, Rule 52, 28 U. S. C. A., following section 723c; Markell v. Hilpert (Fla.), 192 So. 392."

From Rutland Savings Bank v. Wilson, 108 Fed. (2nd) 92, 94, we quote:

"A careful consideration of appellant's complaint of the fact findings in the light of the established rule that such findings will not be disturbed on appeal, un-

less shown to be clearly erroneous, convinces us that the complaint must be rejected."

As we stated in the beginning of this argument, we would present this question under discussion in two different aspects. The second relating to the decision of the Circuit Court of Appeals in deciding the credibility of the witnesses Stewart and Kelley, we now consider. By its opinion, it appears that the reversal as to this point went off on the fact that Kelley was disinterested, and no reason is shown for not believing him. And the testimony of Kelley and Stewart being in conflict, credibility is to be written into the testimony of Kelley and not into that of Stewart, and thus, the case is reversed.

That this is erroneous, we would cite two cases interpreting Rule 52 on the question of credibility of witnesses and at the same time setting out the duty of a Circuit Court of Appeals under this Rule 52, in consideration of conflicting testimony. From Webb v. Frisch, 111 Fed. (2nd) 887, 888 (C. C. A. 7), we quote:

> "Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c, provides that 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' We do not understand that the foregoing rule has enlarged the discretion of this Court in passing upon the probative force of evidence. Our function is to review the findings of the lower court and not to pass upon the evidence de novo. We cannot say that a finding of the fact of prior use is 'clearly erroneous' merely because we might have entertained some doubt about the quantum of evidence. We must attach to the testimony of witnesses the full weight and quality of credibility which the trial court gave it."

From Campana Corporation v. Harrison, 114 Fed. (2nd) 400, 405 (C. C. A. 7), we quote:

"In application of Federal Rule 52 it is the following principle that guides this Court: the reviewing court does not review the evidence as an original fact-finding tribunal; it does not attempt to settle conflicts in evidence or to determine questions of credibility. In re Duvall (7 Cir.), 103 F. (2d) 653, 655; Guilford Const. Co. v. Biggs (4 Cir.), 102 F. (2d) 46, 47."

These quoted statements seem to be most logical, more a fair, just, and equitable interpretation of Rule 52, and give to it a field of operation more nearly in line with the settled practice of entrusting to the trial court the decision as to the credibility of witnesses who testify before it than does the rule as laid down in this case at hand by the Fifth Circuit. Here is a conflict which we deem should be resolved in favor of the holdings of the Seventh Circuit.

What has been heretofore said in argument applies with almost equal force to that portion of the opinion, hereinafter to be set out, rejecting the findings of the trial court as to the value of the suit property in 1932 being $8,500.00, and that the price paid by Dyar at the time was grossly inadequate. The portion of the opinion above referred to is as follows:

"We find no merit in the contention that the price received for the land was so grossly inadequate as to authorize cancellation of the deed. The testimony as to the value of the property in 1932 is in sharp conflict. Witnesses for Dyar place the value as of 1932 at from $1,250.00 to $1,750.00, and the witnesses for Stewart say it was worth about $8,500.00. Certain it is that in the light of present-day conditions property which sold for low prices on an inactive market during the depression will now bring much higher prices on an active real estate market. However, in determining the reasonable market value of the lands in suit, we must go back and live again in the days of the bitter depression of 1932. Furthermore, mere inadequacy of price is not sufficient to create a presumption of fraud. To authorize the court to set aside a conveyance on the ground of inadequacy of price, the inadequacy must be 'so glaring and gross

of an honest and just man.' Danforth v. Burchfield, 201 Ala. 550, 78 So. 904, 905; Dunn v. Ponceler, 235 Ala. 269, 178 So. 40, 44; 27 C. J. 484, Sec. 135."

As we read the opinion (and, incidentally, the third syllabus of West Publishing Company), the Court states that the testimony of the witnesses is in sharp conflict as to the value of the suit property in 1932, and then goes forward, rejects the findings of the trial court as to the value of the suit property in 1932, and without any stated cause or reason for doing so places it on this basis; it is first stated that under present-day conditions farm lands bring higher prices than in 1932. Of course, this is true, but the value of the suit property today is of no concern in determining its value in 1932, nor in determining whether the price paid in 1932 by Dyar was grossly inadequate. Furthermore, the record is wholly devoid as to any testimony as to the value of the suit property as of any date subsequent to 1932. Only one question as to current value was asked, and upon timely objection by the respondent here (Record 94) the same was sustained by the Court.

Yet in determining the value of the property in 1932 the Court uses a formula expressed in these words (Record 200; 132 Fed. [2d] 280):

> "However, in determining the reasonable market value of the lands in suit, we must go back and live again in the days of the bitter depression of 1932."

We know, of course, that Courts take judicial knowledge of the depression of the 30's, yet in those times, as in every other business depression, property had values which could be determined by positive evidence, and the Circuit Court of Appeals recognizes this by holding that the price paid by Dyar was "merely inadequate" and not "grossly inadequate," as the terms are understood and applied in such cases.

However, here in this case the court has, in deciding the value of the suit property as of 1932, fallen in error. As heretofore pointed out, the court has failed to give proper weight and presumption to the findings of the trial court as to the value of the property and has adopted its own arbitrary ruling governing such, and adopts as its rule the fact that property was of little value, relatively speaking, in 1932. In doing this we take the position that the Circuit Court of Appeals has completely ignored and failed to apply the Rule 52 (a), but has for itself adopted another and different method of ascertaining the facts of this case in so far as the value of the suit property is concerned. Hardly does Rule 52 permit and allow such.

Of course, even conceding that the price was "merely inadequate" and not "grossly inadequate," it would be of little moment in this case had the Circuit Court of Appeals upheld our contentions in the first instance with reference to the disputing testimony between Kelley and Stewart, for there would have then been such fraud practiced on Stewart as, coupled with even mere inadequacy of price, would have necessitated the setting aside of this sale.

In a final analysis, we would call this Court's attention to the closing language of the Circuit Court of Appeals in dealing with the question of price as follows:

> "Furthermore, mere inadequacy of price is not sufficient to create a presumption of fraud. To authorize the court to set aside a conveyance on the ground of inadequacy of price, the inadequacy 'Must be so glaring and gross as at once to shock the understanding and conscience of an honest and just man.' Danforth v. Burchfield, 201 Ala. 550, 78 So. 904; Dunn v. Ponceler, 178 So. 40, 44; 27 C. J. 484, §135" (Record page 201).

In adopting this and citing the Danforth case in 201

Alabama, the Court is either splitting hairs or adopting a position which cannot be sustained. The Danforth case cited by the court shows a discrepancy of from less than eight to one to less than ten to one in ratio of inadequacy of value and sale price, while the facts in the case at hand show a discrepancy in the ratio of seven to one. Either the court is drawing a distinction between the ratio of seven to one and less than eight to one, or it has arbitrarily declined to consider the discrepancy in sale price and value in this case. We contend that the Danforth case is authoritative in this case as being a pronunciation by the Supreme Court of Alabama controlling as to what gross inadequacy is, and that the same disproportion in price and value shown in that case applies in this, and that the Court was bound to follow that case in determining that the price here paid was grossly inadequate.

SPECIFICATION OF ERROR TWO.

The other point which we have assigned as error in this case is contained in the following language of the Court (Record 200) as follows:

> "Moreover, it appears that Stewart, who was represented by able counsel, filed his claim in the bankruptcy court and submitted to its jurisdiction; that he lived within about ten miles of the lands in question; and that he regarded the matter with indifference for eight years when he could have by the exercise of little effort determined the status of these lands at any time. When Dr. Dyar purchased the land nine years ago it was inaccessable, run down and unkempt. Since the purchase of the land in 1932 Dr. Dyar has built terraces on the land, has cleared much of it, and a road has been built. Eight years have passed since the confirmation of the sale, the rights of the parties have become fixed, and Stewart may not now be heard to complain that he had no notice of the sale. Bray v. U. S. F. & G. Co., 267 Fed. 533; In re Verdon Cigar Co., 193 Fed. 813."

This is evidently a statement as to laches on the part of Stewart, though it is not denominated as such, but hardly can this statement, standing alone or standing with the facts in this case as shown by the Record, when taken in favor of the settled law of this case with reference to the doctrine of laches, be considered as laches.

In the passage above quoted the court makes reference to the fact that since 1932 Dr. Dyar has built terraces on this property and cleared much of it, and all of which, the Record shows, was done by subsidies furnished by the government, and that a road has been built near the property, which was provided not by Dr. Dyar, but by Lawrence County, Alabama. But more definite and more to the point than any of these is the Alabama doctrine of laches, as set forth in the case of Hausser v. Foley & Company, 190 Ala. 437, 67 So. 252, 253, as follows:

> "The true doctrine concerning laches has never been more concisely and accurately stated than in the following language of an able living judge: 'Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates an estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but, when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.'—Stiness, J., in Chase v. Chase, 20 R. I. 202, 37 Atl. 804." 5 Pom., Eq. Jur., § 21.
>
> "Laches, as has been well said, does not, like limitation, grow out of the mere passage of time, but it is

> founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the property, or the parties. Galliher v. Cadwell, 145 U. S. 368 (12 Sup. Ct. 873, 36 L. Ed. 738); First Nat. Bank v. Nelson, 106 Ala. 535, 18 South. 154."

The period of delay in this case is eight years, two years less than the Statute of Limitations or of adverse possession in Alabama, and no question of passage of time is involved, but merely the question as to whether the parties are in such condition as to whether or not they can be restored to their former state. The Court says that "eight years have passed since the confirmation of the sale, the rights of the parties have become fixed and Stewart may not be heard to complain that he had no notice of the sale." Here again we have adopted as our argument that which has heretofore been acknowledged with reference to the failure of the Circuit Court of Appeals to give due regard to the findings of the lower court. The evidence, and we invite the court's attention to the same, shows beyond question that the rights of the parties have not become fixed, and that there is nothing that has occurred in the nature of an estoppel and any other type of bar which precludes the restoring of the parties in their original position. It would be a simple method of accounting to figure what outlays Dr. Dyar has made on this property, the purchase price, and building of fences and repair of the farm buildings, and restore that amount to him as the petitioner here offered to do in his original petition and deposited funds for such. The words of the Circuit Court of Appeals last quoted above are an unwarranted conclusion from the testimony and unsupported by any facts and are contrary to the findings of the lower court. No disadvantage to Dr. Dyar is shown in any portion of the testimony to have resulted by virtue of any delay, that is, no disadvantage which might have arisen from loss of evidence in the trial

of the cause, from change of title, from the intervention of any equities, or for any other cause, but he is now in the same position which he was in times past; that is, that he has acquired a magnificent bargain at a bankruptcy trustee sale and he wants to hold on to it and reserve for himself the enormous profit which he has made and which profit should pass to the trustee to pay off the obligations owing to the creditors of the W. F. Livingston estate.

The two cases cited by the Court are given in sustaining its position, but are wholly foreign to the portion of the opinion to which they are directed. The Bray case went off on the point that sufficient evidence of fraud was not before the court, and further fact that the complaining creditor had actual notice of the matter in question. However, we contend in this case the Circuit Court of Appeals is wrong in its findings of fact as first argued, that there was no evidence of fraud against Stewart, and that he had actual notice, for this is the very core of the argument as between the credibility of the testimony of Stewart and Kelley. The Vernon Cigar Company case, likewise cited by the Court, involved the question of reasonableness of time for filing a review of the rulings of a Referee in Bankruptcy and a District Judge when such period of time was not limited or designated by positive Statute.

SPECIFICATION OF ERROR THREE.

In conclusion, we say that the entire matter appears to us to hinge upon the Circuit Court of Appeals' attitude towards the findings of fact of the trial court, for, with the sustaining Kelley over Stewart in the first instance, the opinion of the Circuit Court of Appeals falls in, and in this we earnestly insist that, for the reason pointed out above, the opinion is in error. This first decision in the case permeates and goes through the entire opinion and is the basis of the decision of the Court of Appeals. The second point as to the value of the suit property in 1932 like-

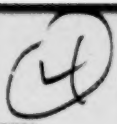
wise hinges on the decision of the Stewart and Kelley controversy, for, as pointed out, even mere inadequacy of price, coupled with the fraud which the trial court found, would require the sale to Dyar to be set aside. Lastly, the findings of the Court that the rights of the parties have become fixed, and it is relying on the Bray case in 257 Fed. (2d), with reference to notice to the creditor and lack of fraud, again turns to the immediate and primary question of whether or not Kelley or Stewart was to be believed. Of course, as argued above, we think that the evidence and the findings of the trial court, that the sale price of the property was grossly inadequate, is to be upheld and no good reason is shown for overturning the same, and no weight apparently was given to the findings of the trial court with reference to the same. In addition, we state that the findings of the Circuit Court of Appeals, with reference to Stewart's delay, are not justified under the evidence or the findings of fact of the trial court, and that the same argument applies to it as to the failure of the Circuit Court of Appeals to give proper notice and care to the findings of the trial court.

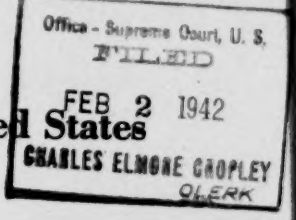
Wherefore, petitioners, separately and severally, respectfully pray that the petition for certiorari be granted in this case to the Fifth Circuit Court of Appeals, and that the judgment of said Court will be reversed and rendered.

BENTON LITTLETON BRITNELL,
Attorney at Law,
Decatur, Alabama,
Solicitor of Record for Petitioners.

I, Benton Littleton Britnell, Solicitor of Record for the petitioners, certify that the foregoing petition for certiorari is filed in good faith and believing the same to be meritorious.

Benton Littleton Britnell,
Solicitor for Petitioners.





IN THE

Supreme Court of the United States

October Term, 1941.

No. 854

W. T. STEWART, Trustee of the Estate of W. F. LIVINGSTON, Bankrupt, et al.,

Petitioners,

versus

J. P. DYAR,

Respondent.

ANSWER AND BRIEF IN OPPOSITION TO PETITION FILED FOR WRIT OF CERTIORARI.

WILLIAM L. CHENAULT,
Russellville, Alabama,
Attorney for Respondent.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1941.

No. 854.

W. T. STEWART, Trustee of the Estate of W. F. LIVINGSTON, Bankrupt, et al.,

Petitioners,

versus

J. P. DYAR,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

Now comes J. P. Dyar, respondent to the petition for writ of certiorari to this Court in this cause, and hereby makes answer to said petition for said writ, and opposes the issuance of said writ of certiorari for the following reasons:

The transcript of the Record of the case in the United States Circuit Court of Appeals, as filed here, gives a full

and detailed statement of the case better than we can give the same.

The District Court of the United States for the Northeastern Division of the Northern District of Alabama entered its order and decreed the deed from Marvin Kelley, as Trustee in Bankruptcy of the W. F. Livingston estate to this respondent, J. P. Dyar. J. P. Dyar, feeling himself aggrieved by reason of said decree appealed the same to the United States Circuit Court of Appeals, and the opinion and decree of that Court reversed the District Court and held the deed to J. P. Dyar valid. This petition for a writ of certiorari in this cause is by the original petitioner or complainant in the case in the District Court, praying that a writ of certiorari issue from this Court to the United States Circuit Court of Appeals for the purpose of reviewing the opinion and decree of that Court in reversing the District Court.

On pages 16 and 17 of the petition for writ of certiorari and the brief in support of the same are set out by the petitioner the questions presented. On page 18 are the reasons for granting the writ, and on page 22 is the Specification of Errors.

"The only question for consideration in the Supreme Court on a petition for certiorari is that stated in the petition." *Helvering v. Taylor,* 293 U. S. 507, 55 Sup. Ct. Rep. 287, 79 L. Ed. 623.

Another proposition to which we wish to call the attention of the Court at this place is the fact that the Supreme Court will not examine the grounds on which the Circuit

Court of Appeals put a correct decision. *Alpha S. S. Corp. vs. Cain,* 281 U. S. 642, 50 Sup. Ct. Rep. 443, 74 L. Ed. 1086.

Then the only question before this Court is the one set out by the petitioner for this writ, and if the Circuit Court of Appeals pursued a wrong reason but reached the right conclusion, this Court will not set aside or reverse the opinion or decree of the United States Circuit Court of Appeals, and will deny this writ.

Another proposition in this case which is undisputed is that the petitioner, J. F. Stewart, filed his claim in the bankrupt court in the bankruptcy of the estate of W. F. Livingston. He thereby became a party to the bankruptcy proceeding and was chargeable with all orders, decrees and things done in the administration of said estate. It is furthermore undisputed that the said J. F. Stewart became surety on the trustee's bond of Marvin Kelley when he was appointed trustee of the W. F. Livingston bankrupt estate. John R. Sample, who represented the trustee, Marvin Kelley, was also the attorney for the petitioner, J. F. Stewart, and filed his claim in said bankruptcy proceeding. Therefore, the knowledge of the attorney in this proceeding was the knowledge of J. F. Stewart.

U. S. C. A., Title 11, Section 72, in part is as follows: "All creditors of a bankrupt's estate shall at their first meeting after adjudication, or after a vacancy has occurred in the office of Trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or after there is a vacancy in the office of trustee, appoint one or three trustees of such estate."

In Note 21 on page 163, under said section quoted, we find the following: "The bankrupt's creditors have the primary right to appoint the trustee for the bankrupt estate."

U. S. C. A., Title 11, Section 75, sets out the duties of the trustee in bankruptcy. Subdivision 2 of Section 75 is in part as follows: "And such trustee as to all property in the custody or coming into the custody of the bankrupt court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." Section 7 of this same section is as follows: "Lay before the final meeting of the creditors detailed statement of the administration of the estate."

"The purpose of the bankruptcy act is to permit creditors to direct and supervise liquidation of bankrupt estate which belongs to them, and their right to appoint a trustee is unqualified unless by the concluding sentence of Section 11 of this paragraph." *In re Day Lumber Company,* 8 Fed. (2nd) 146.

"Election of a trustee will be disapproved where that result has been obtained through the active efforts of the bankrupt." *In Re Rothelder,* 232 Fed. 398.

From these cases it will be seen that Marvin Kelley, as trustee of the bankrupt estate of W. F. Livingston, was the

agent and representative of the creditors of said estate, including the petitioner, J. F. Stewart. Kelley did not represent Dr. J. P. Dyar, and did not represent W. F. Livingston in any transaction with reference to said bankrupt estate.

The case for the petitioner, J. F. Stewart, does not stand alone on his testimony. The case of Dr. J. P. Dyar does not stand alone upon the testimony of Marvin Kelley. The evidence of the petitioner, Stewart, and the evidence of the trustee, Kelley, are in direct conflict in some particulars in the case, but their evidence is not all the evidence in the case. In order to make a correct decision the Court must look at all of the evidence, and look at this evidence in the light of the law governing the facts.

The first paragraph of the petitioner's brief, at the top of page 27, admits the right of the United States Circuit Court of Appeals in overturning and upsetting the findings of facts by the District Court, even though the trial court heard and saw the evidence.

This petition for a writ of certiorari should not be granted.

(a) J. F. Stewart was a party to the bankrupt proceedings of W. F. Livingston as one of the creditors, and chargeable with all things done therein, and even executed the bond for Marvin Kelley as trustee of this bankrupt estate.

(b) The petitioner, J. F. Stewart, filed his claim and had it allowed in this bankrupt estate.

(c) John R. Sample was the lawyer for this petitioner, J. F. Stewart, in the filing of his claim, and represented him in the bankruptcy proceeding, and was also attorney for Marvin Kelley, trustee of this bankrupt estate.

(d) Marvin Kelley, as such trustee, was the agent and representative of the creditors of this bankrupt's estate, including the petitioner, J. F. Stewart, and at no time and in no way did he represent W. F. Livingston, the bankrupt, or J. P. Dyar, the purchaser of the farm.

(e) There is no fraud charged or shown on the part of Marvin Kelley, trustee, or on the part of J. P. Dyar, the purchaser of said farm.

(f) The recording of the deed of Marvin Kelley, as trustee, to J. P. Dyar, as purchaser of said farm, was notice to all persons, including J. F. Stewart, that Dyar had purchased the farm, the description of the farm he purchased, and the price paid for it. His possession of this farm after this deed was on record was notice to the world of his claim to the farm, and under what title he did so claim.

On page 16 of the petition, paragraph 1, under "Questions Presented", is a fair presentation of this case. This undertakes to eliminate the whole evidence except that of two witnesses. The only way that the Court can arrive at a just conclusion and estimate is to consider all the evidence, and not limit it to two witnesses.

In answer to paragraph 2 at the bottom of page 16 of the petition, we maintain that the Court of Appeals was fully justified in passing upon the credibility of witnesses who testified before the District Court, because the whole transcript was before the Court of Appeals, and, therefore, it was enabled to judge of the credibility of these witnesses.

In answer to paragraph 3 at the top of page 17, we affirm the proposition that the Circuit Court of Appeals was thoroughly justified in reversing the findings of fact of the District Court as to the value of this property by the witnesses who were in sharp conflict. The fact that the members of the Circuit Court of Appeals sat in this case as a Court does not take away from them their own every day experience of the affairs of men and the values of property. The Court took judicial knowledge of the severe depression through which the country was struggling in 1932, the time this respondent, J. P. Dyar, purchased this property.

In answer to paragraph 4 on page 17 of the petition, we say that the petitioner, J. F. Stewart, was guilty of such gross laches by his delay in filing his petition in the District Court, that he is not at this late day entitled to overturn the sale of this property to this respondent. The evidence shows in this case that J. P. Dyar, the respondent, can not be restored to his former position if his deed to this property is cancelled.

In answer to paragraph 5 on page 17, we say that the Circuit Court of Appeals properly decreed the reversal of the finding of fact No. 1 of the District Court.

In answer to paragraph 6 on page 17, we say that the Circuit Court of Appeals did not err in the reversal of the finding of fact of the District Court numbered Two.

In answer of paragraph 7 at the bottom of page 17, we say that the Circuit Court of Appeals did not err in the reversal of the finding of fact of the District Court numbered Three.

On page 18 *et seq.* are set out "Reasons for granting the writ." The petitioner is in error in this statement from the fact that the findings of fact of the District Court were erroneously made on the evidence before the Court.

Number Two of the reasons for granting the writ is in error because the Court of Appeals had the whole testimony before it from which to judge as to the credibility of the witnesses, Kelley and Stewart.

The third paragraph on page 19 of the "reason for granting the writ" is based on error in that the trustee, Kelley, represented the creditors, and not Dyar, and that inadequacy alone of the price of the land does not justify setting the deed aside. The case of *Danforth Burchfield*, 201 Ala. 550, 78 So. 904, is not in point. In that case an ignorant, uneducated negro was overrun, and the Court properly set aside the sale. In the present case all of the parties to the transaction were intelligent white men, and there was no overrunning of any one.

Paragraph 4 on page 19 of the petition, under "Reasons for granting the writ", is in error. The condition of the farm, and the general conditions, as shown by the evi-

dence, had materially changed from 1932, the time Dr. Dyar purchased the farm, to the time of the hearing in the District Court. Also under the law it was not necessary that Stewart have notice of the possession by Dr. Dyar of this property; but we say that he did have notice and in several different ways.

This respondent, J. P. Dyar, therefore hereby submits to the Court that the writ of certiorari should not be granted in this cause, and that the opinion and decree of the Circuit Court of Appeals should rest undisturbed.

William L. Chenault

WILLIAM L. CHENAULT,
Of Russellville, Alabama,
Solicitor for Respondent.